SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
APPELLANTS,

vs.

MARGARET WISSNER

APPEAL FROM THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT, STATE OF CALIFORNIA

FILED JUNE 14, 1949.

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[fol. 1]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF STANISLAUS

(File endorsement omitted)

No. 33,856

MARGARET V. WISSNER, Plaintiff,

vs.

LOUISE M. WISSNER AND LEANDOUS H. WISSNER, Defendants

FIRST AMENDED COMPLAINT—Filed March 15, 1947

Comes now the plaintiff and as and for a first cause of action against the defendants and each thereof, alleges as follows, to wit:

I

That at all times mentioned herein the plaintiff, Margaret V. Wissner, and Leonard O. Wissner, were bona fide residents of the State of California, and that the plaintiff, Margaret V. Wissner, and Leonard O. Wissner intermarried at the City of Glendale, County of Los Angeles, State of California, on the 16th day of August, 1930, and ever since said date and up to the death of the said Leonard O. Wissner, were husband and wife; that the said Leonard O. Wissner was not possessed of any property whatever at the time of his said marriage to plaintiff.

II

That the said Leonard O. Wissner died testate in Kalai Kunda, India, on the 14th day of November, 1945, and left Margaret V. Wissner, the plaintiff herein, as his surviving widow; that all of the property possessed by said Leonard O. Wissner at the time of his death was community property and that subsequent to the marriage of said Leonard O. Wissner and the plaintiff herein, as hereinabove alleged, [fol.2] the said Leonard O. Wissner acquired no property whatsoever by gift, devise, or bequest and that all property in the possession or control of said Leonard O.

Wissner at all times subsequent to his marriage with the plaintiff herein was acquired by the joint efforts of the plaintiff and the said Leonard O. Wissner and while they were husband and wife and that all of said property was acquired by them in said manner while they were residents of the State of California.

III

That prior to the date of death of Leonard O. Wissner as hereinabove alleged, he did, without the consent or knowledge or acquiescence of the plaintiff, Margaret V. Wissner, and without her joining in said transactions and against her will and consent, assign, transfer, deliver, and make gifts of property of the community to the defendants herein and to each of said defendants, said gifts consisting of money in an amount somewhere between $3,000.00 and $4,000.00, a Mercury automobile of the value of approximately $1600.00, and stocks, bonds, and other articles of value, the exact description, character, and value of which are unknown to this plaintiff; that the defendants are fully advised of and have complete knowledge of the properties of the community received by them from the said Leonard O. Wissner but that said defendants and each thereof, in spite of repeated demands on them for delivery to plaintiff of her rightful interest in said properties of the community and for a statement and account thereof, have refused and neglected and still refuse and neglect to give to plaintiff and statement of account of said properties and refuse and and neglect to deliver to plaintiff her rightful interest in said properties of the community; that the assignment, transfer and delivery of said properties of the community to the defendants herein, as hereinabove alleged, was solely and wholly without consideration and that as a result [fol. 3] thereof this plaintiff has been defrauded and deprived of her community interest in said moneys, automobile, stocks, bonds, and other assets transferred, delivered, and given to the defendants and each thereof, as hereinabove alleged.

IV

That, as hereinabove set forth, said defendants and each thereof fail, neglect, and refuse to make an accounting of said property and said defendants claim and each thereof claims to be the owner of and entitled to said moneys, said

automobile, and said other assets and property of the community but that said defendants do not have and neither of said defendants has any right, title, or interest in or to said property.

As and for a second and separate cause of action herein, plaintiff alleges as follows, to wit:

I

Plaintiff hereby specifically refers to, incorporates herein, and makes a part of this, her second cause of action paragraphs I and II of plaintiff's first cause of action.

II

That the deceased, Leonard O. Wissner, was at the time of his death serving in the army of the United States of America, under the rank of Major, and that said deceased had served in the army of the United States of America for several years prior to his death; that during the time of his service in the said United States Army he, the said deceased Leonard O. Wissner, subscribed for and there was issued to him a National Service Life Insurance Policy in the principal sum of $10,000.00 and that plaintiff is informed and believes and therefore alleges that the numbe: of said policy is 14 N 865 6931; that thereafter, on the 14th day of November, 1945, the said Leonard O. Wissner, being at that time the husband of plaintiff herein, died in Kalai Kunda, India, as hereinabove alleged, and that at said time said [fol. 4] insurance policy hereinabove referred to was in full force and affect; that the premiums on said insurance policy above referred to and the whole thereof were paid from the earnings of the said Leonard O. Wissner, he being at the time of the issuance thereof and at all times thereafter, the husband of this plaintiff, and his said earnings being the community property of plaintiff and himself.

III

That the beneficiaries named in said policy of insurance above referred to were the defendants herein, the defendant Louise M. Wissner being named as the principal beneficiary under said policy and the defendant Leandous H. Wissner being named as the contingent beneficiary under said policy; that the plaintiff herein never at any time had knowledge

that the said Leonard O. Wissner had named anyone other than herself as beneficiary under said policy and that said plaintiff did not at any time consent to the naming of anyone other than herself as beneficiary under said insurance policy and that said plaintiff did not at any time consent to the application or use of community funds to the payment of premiums on a policy of insurance wherein the defendants or either thereof were named as beneficiaries.

IV

That said defendants and each thereof have received as proceeds of said policy the sum of $76.70 per month, commencing as of November 14, 1945, and that said defendants and each thereof has received for the use and benefit of the belief of plaintiff herein, have received as proceeds of said insurance policy the total sum of $1764.10 up to and including the month of September, 1947; that as a result of and because of the payment of premiums on said policy with community funds, as aforesaid, the plaintiff is now and at all times herein mentioned has been, entitled to one-half of the proceeds of said policy and the said defendants have and each thereof has recived for the use and benefit of the [fol. 5] plaintiff herein from the proceeds of said policy the total sum of $882.05, with interest on the monthly installments received under said policy as herein alleged at the rate of 7% per annum from the date when said payments were received by the said defendants and each thereof; that although plaintiff has often demanded of defendants that they pay and deliver to her the amounts due her from the proceeds of said insurance policy as hereinabove alleged, said defendants and each thereof have neglected and refused and still neglect and refuse to pay said sums or any part thereof to plaintiff and that the entire amount of $882.05, together with interest thereon at the rate of 7% per annum from the date of the receipt of each installment, is now due, owing, and unpaid from the defendants and each thereof to plaintiff.

As and for a third and separate cause of action herein plaintiff alleges as follows, to wit:

I

Plaintiff hereby specifically refers to, incorporates herein and makes a part of this, her third cause of action, Paragraph I of plaintiff's first cause of action.

II

That the said Leonard O. Wissner entered the army of the United States of America as a captain on or about the 9th day of November, 1942, and was later promoted to the grade of major and continued in the army of the United States of America in said grade of major until the 14th day of November, 1945, on which date he died in Kalai Kunda, India, and left Margaret V. Wissner, the plaintiff herein, as his surviving widow; that during all of the years of service of said Leonard O. Wissner in the army of the United States, namely, from November 9, 1942 to November 14, 1945, he received from the United States of America a specified payment each month for the support, maintenance, and care of his wife, Margaret V. Wissner, the plaintiff herein; that said payment was never less than $90.00 per month and [fol. 6] that, according to the information and belief of the plaintiff herein, said payment exceeded said sum of $90.00 per month after the said Leonard O. Wissner attained the grade of major; that said moneys were paid to the said Leonard O. Wissner each month by the United States government for the use and benefit of this plaintiff and for her support and maintenance and for no other purpose, but that said Leonard O. Wissner failed and neglected to pay said moneys or any part thereof, save and except the sum of $540.00, to this plaintiff but that on the contrary, the said Leonard O. Wissner, after the first six months of his service in the United States army, paid and delivered to the defendants herein all of said moneys that were received by him from the United States government for the use and benefit of the plaintiff herein and that said defendants now have in their possession a sum of money in excess of $3000.00 which was paid to them by the said Leonard O. Wissner out of moneys received by him from the United States government for the use and benefit of this plaintiff, as hereinabove alleged, and that said defendants now hold

in their possession said sum of money in excess of $3000.00, the exact amount being unknown to this plaintiff but well known to the defendants, which was received by said defendants for the use and benefit of this plaintiff and which said money belongs to and is the property of this plaintiff.

III

That although plaintiff has often demanded of defendants that they pay said moneys hereinabove referred to to plaintiff, the said defendants and each thereof have refused and neglected and still refuse and neglect to pay the same or any part thereof to the plaintiff herein and refuse to make any accounting of said moneys to this plaintiff.

WHEREFORE, plaintiff prays judgment against said defendants and each thereof as follows, to wit:

[fol. 7] 1. That said defendants and each thereof be required to make a full and complete accounting of all moneys, personal property, bonds, stocks, or other assets received from the said Leonard O. Wissner and a complete accounting of all moneys or property received in exchange for any of said assets.

2. That the court adjudge and determine the amount of moneys, stocks, bonds, or other assets or property received by the defendants or either thereof from the said Leonard O. Wissner belonging to this plaintiff and enter judgment against the defendants and each thereof for the sum of money — which plaintiff is entitled and further declare the defendants are holding the portion of said moneys, stocks, bonds, or other assets or property belonging to plaintiff in trust for plaintiff and require them to deliver the same up to this plaintiff.

3. That judgment be entered against said defendants and each thereof in favor of plaintiff for the sum of $882.05 on account of the proceeds of the insurance policy referred to herein received by them and belonging to plaintiff, together with interest thereon and on the respective installments thereof from the date when the same were received until paid, at the rate of 7%.

4. That the defendants and each thereof be ordered and required to pay and deliver to plaintiff herein one-half of all moneys hereafter received from the proceeds of the said

insurance policy immediately upon the receipt thereof by the said defendants or either thereof.

5. For such other and further relief as to the court may seem just and equitable in the premises and for plaintiff's costs of suit herein incurred.

Dated this 13th day of March, 1947.

Cleary and Zeff, By Leslie A. Cleary, Attorneys for Plaintiff.

[fol. 8] *Duly sworn to by Margaret V. Wissner. Jurat omitted in printing.*

[fol. 9] IN SUPERIOR COURT OF STANISLAUS COUNTY

ANSWER TO FIRST AMENDED COMPLAINT—Filed April 21, 1947

Come now the defendants above named and answer the first cause of action as set forth in plaintiff's first amended complaint on file herein as follows, to wit:

I

In answer to paragraph I of said first cause of action, said defendants aver that the said Leonard O. Wissner was possessed of a Ford automobile of the estimated value of $450.00 at the time of his marriage to plaintiff. Otherwise said defendants admit the allegations of paragraph I of said first cause of action.

II

Answering paragraph II of said first cause of action, said defendants aver that certain of the property possessed by Leonard O. Wissner at the time of death was joint property of himself and plaintiff held in joint tenancy and was not therefore community property. Except for the foregoing, defendants admit the allegations of paragraph II of said first cause of action.

III

Save and except as hereinafter stated, defendants deny each and every, all and singular, the allegations, matters and things alleged and set forth in paragraph III of said first cause of action. In this respect said defendants aver that prior to his death the said Leonard O. Wissner did pay

and deliver to defendants approximately $3,000 in cash and a Mercury automobile, which defendants subsequently sold for the sum of $1,080; that said money and automobile were paid and delivered to the defendants in repayment of money advanced to said Leonard O. Wissner and help and assistance given to him during the time that he was acquir- [fol. 10] ing his medical education and for other moneys advanced to him and assistance given him during his early life; that said decedent was a dutiful son and acknowledged his obligation to the defendants herein, his parents, and paid and delivered said money and automobile to the defendants in payment of and on account of said obligation.

IV

Deny generally and specifically, each and every, all and singular, the allegations, matters and things alleged and set forth in paragraph IV of said first cause of action, except that said defendants acknowledge that they have made no formal accounting to the plaintiff, and in this respect said defendants aver that they did not and do not consider themselves morally or legally obligated to make any formal accounting to the plaintiff.

Said defendants answer the second cause of action as set forth in plaintiff's first amended complaint as follows: to wit:

I

Said defendants hereby adopt and incorporate herein and make a part hereof their answers to paragraphs I and II of plaintiff's first cause of action as their answer to paragraph I of plaintiff's second cause of action.

II

Subject to the qualifications hereinafter stated, said defendants admit the allegations of paragraph II of said second cause of action. In this respect, said defendants aver that the premiums on the policy of life insurance therein mentioned were paid by deduction from the pay of the said Leonard H. Wissner as an officer in the U. S. Army; that at the time said policy was issued and obtained defendants herein were designated as beneficiaries therein and at all times remained so designated; that defendants are informed and believe and therefore allege the fact to be that

[fol. 11] a soldier in the Army of the United States of America has the legal right to designate the beneficiary in any National Service Life Insurance policy issued on his life, and that the designation of the defendants herein as beneficiaries in said policy is final and conclusive as against any claimed rights of the plaintiff.

III

Admit that the beneficiaries named in said policy of insurance above referred to were the defendants herein, the defendant Louise M. Wissner being named as the principal beneficiary under said policy, and the defendant Leandous H. Wissner being named as the contingent beneficiary under said policy. Except for the foregoing, said defendants aver that they have no knowledge, information or belief sufficient to enable them to answer the allegations of said paragraph III or any part thereof, and basing their denials upon such want of knowledge, information or belief they deny said allegations and each and all thereof.

IV

The defendant Louise M. Wissner admits that she has received, as proceeds of said policy, the sum of $76.70 per month commencing as of November 14, 1945, and that she has received, as proceeds of said insurance policy, the total sum of $1227.20 up to and including the month of February, 1947. Except for the foregoing, said defendants and each of them deny each and every, all and singlar, conjunctively and disjunctively, the allegations, matters and things alleged and set forth in paragraph IV of said second cause of action.

Said defendants answer the THIRD CAUSE OF ACTION as set forth in plaintiff's first amended complaint as follows, to wit:

I

Said defendants hereby refer to their answer to paragraph I of the first cause of action and incorporate, adopt and replead the same herein as their answer to the first [fol. 12] paragraph of said third cause of action.

II

Admit that said decedent Leonard O. Wissner left Margaret V. Wissner, the plaintiff here, as his surviving

widow. Admit that Leonard O. Wissner died on the 14th day of November, 1945, at Kalai Kunda, India. Except for the foregoing, the defendants aver that they have no knowledge, information or belief sufficient to enable them to answer the allegations of paragraph II of said third cause of action or any thereof, and basing their denials upon such want to knowledge, information or belief they deny said allegations and each and all thereof. Deny that any money received by these defendants was money received by the said Leonard O. Wissner, deceased, for the use and/or benefit of the plaintiff herein. Deny that any moneys received by the defendants were received by them for the use and/or benefit of the plaintiff. Deny that said moneys or any moneys received by the defendants from the said Leonard O. Wissner are the property of the plaintiff.

III

Admit that defendants have refused to pay any money to plaintiff, and in this respect said defendants aver that they are not indebted to plaintiff in any way, shape or form, and do not have in their possession any money or property belonging to plaintiff.

Wherefore, said defendants pray that plaintiff take nothing by her amended complaint on file herein and that they have and recover their costs of suit incurred herein.

Vernon F. Gant, Attorney for said Defendants.

[fol. 13] *Duly sworn to by Leandous H. Wissner. Jurat omitted in printing.*

[fol. 14] [File endorsement omitted]

In Superior Court of Stanislaus County

Findings of Fact and Conclusions of Law—Filed January 2, 1948

The above entitled cause came on regularly for trial on the 3rd day of October, 1947, before the court, Honorable B. C. Hawkins judge thereof, sitting without a jury, a jury trial having been duly waived by all parties; Leslie A. Cleary, Esquire, of the firm of Cleary and Zeff, appeared on behalf of the plaintiff, and Carlos J. Badger, Esquire,

associated with Vernon F. Gant, Esquire, appeared on behalf of the defendants;

Relevant and competent evidence, both oral and documentary, was offered and received on behalf of the parties to the action and the matter having been submitted for decision, the Court from the evidence so introduced and received now finds the facts as follows, to wit:

1. That the plaintiff, Margaret V. Wissner, and Leonard O. Wissner intermarried at the City of Glendale, County of Los Angeles, State of California, on the 16th day of August, 1930, and ever since said date and up to the death of said Leonard O. Wissner were husband and wife; that at all times subsequent to said marriage and at all times mentioned in plaintiff's complaint, the said Margaret V. Wissner and Leonard O. Wissner were residents of and domiciled in the state of California; that Leonard O. Wissner was not possessed of any property at the time of his marriage to plaintiff except a Ford automobile of the value of approximately $450.00 and his clothing and personal effects, and that at that time his indebtedness was in excess of $750.00; that plaintiff at the time of the marriage had approximately $300.00 in cash.

2. That the said Leonard O. Wissner died testate in Kalai Kunda, India, on the 14th day of November, 1945, and [fol. 15] left Margaret V. Wissner, the plaintiff herein, as his surviving widow; that all of the property possessed by the said Leonard O. Wissner at the time of his death was community property of himself and the plaintiff in this action and that all property owned or possessed by the said Leonard O. Wissner subsequent to his marriage with the plaintiff herein was acquired by the joint efforts of the plaintiff and the said Leonard O. Wissner and while they were husband and wife and that all of the said property was acquired by them in said manner while they were both residents of and both domiciled in the State of California and was community property.

3. That prior to the date of death of Leonard O. Wissner he did, without the consent or knowledge or the acquiescence of the plaintiff, Margaret V. Wissner, and without her joining in said transactions and against her will and consent and without consideration, assign, transfer, deliver, and make gifts of the property of the community to the defendants herein, of the total value of $4600.00, namely, $3000.00

in money and a Mercury automobile of the value of $1600.00; that the plaintiff, Margaret V. Wissner, prior to the institution of this action, demanded of the defendants and each thereof that they account for and pay over to her her community interest in said moneys and in said automobile, being ½ thereof, or a total of $2300.00, but that said defendants and each thereof refused to account for or deliver to or pay over to the plaintiff, Margaret V. Wissner, her community interest in said money and in said automobile or any part thereof; that the transfer of said community property of the plaintiff and Leonard O. Wissner by the said Leonard O. Wissner to the defendants herein, namely, said sum of $3000.00 and said automobile of the value of $1600.00, was wholly without consideration and that as a result thereof the plaintiff was deprived and defrauded of her community interest in said moneys and in said automobile;

That on or about the 23rd day of September, 1943, Leon- [fol. 16] ard O. Wissner delivered the Mercury automobile which was the community property of the plaintiff and the said Leonard O. Wissner to the defendants and endorsed the title papers to them and with his knowledge and consent they used said car from said time and had said car licensed in their names. That the plaintiff knew that said car was being used by said defendants and the brother of the said Leonard O. Wissner and did not object to said use until after the death of the said Leonard O. Wissner and the sale of said automobile. That at the time demand was made on said defendants for said moneys and said automobile, said moneys, except $500.00, had been removed from said joint bank account of the said Leonard O. Wissner, and the defendants, Louise M. Wissner and Leandous H. Wissner, and said automobile had been sold for the sum of $1,080.00. That said sum of $1,080.00 was the reasonable value of said automobile at the time the same was sold.

4. That the plaintiff is the owner of and entitled to ½ of the value of said community property so transferred and delivered by the said Leonard O. Wissner to the defendants and each thereof and is entitled to receive the value thereof back from said defendants and each thereof.

5. That the deceased, Leonard O. Wissner, was at the time of his death serving the army of the United States of America with the rank of Major and that said deceased had served in the army of the United States of America for

several years prior to his death; that at the time of the death of said Leonard O. Wissner he was the holder of a National Service Life Insurance policy in the principal sum of $10,000.00 which said policy matured and was payable upon his death on November 14, 1945; that the said Leonard O. Wissner at the time of the issuance of said policy of insurance to him and during all of the time thereafter up to his death was the husband of this plaintiff and that both he and this plaintiff were at the time of the issuance of said insur- [fol. 17] ance policy and at all times thereafter legal residents of and domiciled in the State of California; that the premiums on said insurance policy and the whole thereof were paid from the earnings of the said Leonard O. Wissner and that the said earnings of the said Leonard O. Wissner from which the premiums on said insurance policy were paid were the community property of the plaintiff and the said Leonard O. Wissner and that all of the premiums paid on said policy of insurance were paid with the community property of the plaintiff and her said husband, Leonard O. Wissner;

6. That the beneficiaries named in said policy of Insurance on the life of the said Leonard O. Wissner were the defendant, Louise M. Wissner, who was named as the principal or primary beneficiary, and the defendant, Leondous H. Wissner, who was named as the contingent beneficiary; that the plaintiff never at any time prior to the death of Leonard O. Wissner had any knowledge that the said Leonard O. Wissner had named anyone other than herself as beneficiary under said policy and that the plaintiff did not at any time consent to the naming of anyone other than herself as beneficiary under said policy and that said plaintiff did not at any time consent to the application or use of community funds to or for the payment of premiums on said insurance policy or on any policy of insurance wherein the defendants or either thereof were named as beneficiaries and that the naming of said defendants and each thereof as beneficiaries under said policy was without consideration;

7. That the proceeds of said insurance policy were and are the community property of plaintiff and Leonard O. Wissner and that plaintiff is entitled to ½ of the entire proceeds of said insurance policy when and as the same are paid to the defendants or either thereof, and is entitled to recover ½

of the proceeds thereof from the defendants and each thereof when and as the same are received by said defendants or either thereof.

[fol. 18] 8. That said defendants and each thereof have received as proceeds of said policy the sum of $76.70 per month commencing as of November 14, 1945, and that the total amount received by said defendants and each thereof up to the time of the trial of this action was and is the sum of $1764.10, including the payment of $76.70 received by said defendants under said policy in the month of September, 1947;

That plaintiff at all times herein mentioned has been entitled to receive from the defendants and each thereof ½ of the proceeds of said policy of insurance and is entitled to receive from said defendants and each thereof ½ of the total amount collected by said defendants, or the sum of $882.05, with interest on the monthly installments received by said defendants and each thereof under said insurance policy from the time when the same were received at the rate of 7% per annum and up to the date of the entry of judgment herein; that plaintiff is further entitled to receive from defendants and each thereof ½ of any and all proceeds of said insurance policy received by them in the future under said insurance policy and is entitled to receive from said defendants ½ of each monthly installment of proceeds immediately upon the receipt thereof by said defendants of either thereof;

That in the event of the failure of the defendants to pay over to plaintiff ½ of said proceeds within five (5) days after the receipt thereof by them, plaintiff is entitled to recover interest thereon at the rate of 7% per annum until paid.

9. That the defendants herein did not receive from Leonard O. Wissner any moneys paid to him by the United States Government for the use and benefit of plaintiff herein as alleged in plaintiff's third cause of action.

As conclusions of law from the foregoing findings of fact, the Court finds that the plaintiff is entitled to judgment against the defendants and each thereof as follows:

[fol. 19] 1. For the sum of $2300.00, together with interest thereon at the rate of 7% per annum from November 14, 1945, to date of judgment herein.

2. For the further sum of $882.05 with interest at 7% per annum on each accruing installment of insurance from the date when the same was paid to the defendant, Louise M. Wissner, up to the date of Judgment, said installments belonging to the plaintiff, being in the sum of $38.35 per month commencing with November 14, 1945.

3. That plaintiff is entitled to receive from the defendants ½ of any and all proceeds of the said National Service Life Insurance policy on the life of Leonard O. Wissner, deceased, at the time the same are received by the defendants or either thereof, and that said defendants and each thereof shall pay over ½ of said proceeds immediately upon the receipt thereof to this plaintiff and that failing to do so within five days after receipt thereof, said defendants and each thereof shall pay plaintiff interest thereon at the rate of 7% per annum until the same are paid.

4. That plaintiff recover her costs of suit herein incurred from the defendants and each thereof.

Dated this 2nd day of January, 1948.

B. C. Hawkins, Judge of the Superior Court.

[fol. 20] [File endorsement omitted]

In Superior Court of Stanislaus County

Judgment—Filed January 8, 1948

This cause came on regularly for trial before the court sitting without a jury on the 3rd day of October, 1947, Leslie A. Cleary, Esquire, of the firm of Cleary and Zeff, appearing as attorney for the plaintiff, and Carlos J. Badger, Esquire, associated with Vernon F. Gant, Esquire, appearing as attorney for the defendants;

The Court heard the testimony and received evidence, both oral and documentary, on behalf of the respective parties and having examined the proofs and being fully advised in the premises, the Court filed herein its findings of fact and conclusions of law and directed that judgment be

entered in accordance therewith; Now, therefore, by reason of the law and the findings aforesaid:

It is hereby ordered, adjudged, and decreed as follows, to wit:

1. That plaintiff have and recover judgment against the defendants and each thereof for the sum of $2300.00, together with interest thereon at the rate of 7% per annum from November 14, 1945, up to the date of judgment herein.

2. That plaintiff have and recover judgment against the defendants and each thereof for the sum of $882.05, together with interest in the sum of $72.68, being the interest on the plaintiff's ½ of each accruing installment of insurance at 7% per annum from the date when the same was paid to the defendant, Louise M. Wissner, up to the date of judgment herein, commencing with the installment paid on November 14, 1945, and including the payment made in the month of September, 1947.

[fol. 21] 3. That plaintiff have and recover from the defendants and each thereof ½ of any and all proceeds of the National Service Life Insurance policy on the life of Leonard O. Wissner, deceased, at the time the same are received by the defendants or either thereof and said defendants and each thereof are hereby ordered to pay over to the plaintiff ½ of any and all proceeds of said National Service Life Insurance policy on the life of said Leonard O. Wissner, deceased, immediately upon the receipt thereof by said defendants or either thereof, commencing with the installment received by said defendants in the month of October, 1947; should said defendants or either thereof fail to pay ½ of said proceeds to plaintiff within five (5) days after the receipt thereof, the plaintiff shall recover interest thereon at the rate of 7% per annum until the same are paid.

4. That plaintiff have and recover her costs of suit herein from said defendants and each thereof, which said costs are hereby taxed in the sum of $——.

Dated this 2nd day of January, 1948.

B. C. Hawkins, Judge of the Superior Court.

[fol. 22] [File endorsement omitted]

IN SUPERIOR COURT OF STANISLAUS COUNTY

NOTICE OF APPEAL—Filed January 19, 1948

To the Clerk of the Above Entitled Court:

You will please take notice that the defendants hereby appeal to the District Court of Appeal of the State of California, Third Appellate District, from the judgment therein entered in the said Superior Court on the 8th day of January, 1948, in favor of the plaintiff in said action, and against said defendants; and from the whole thereof.

Dated this 19th day of January, 1948.

Vernon F. Gant and Carlos J. Badger, Attorneys for Defendants.

Receipt of copy of the within and foregoing Notice of Appeal admitted this 19 day of January, 1948.

Cleary & Zeff, Attorneys for Plaintiff.

[fol. 23] IN DISTRICT COURT OF APPEAL OF CALIFORNIA

[Civ. No. 7528. Third Dist. Jan. 21, 1949.]

MARGARET V. WISSNER, Respondent,

v.

LOUISE M. WISSNER et al., Appellants

[fol. 24] Appeal from a judgment of the Superior Court of Stanislaus County. B. C. Hawkins, Judge. Affirmed.

Action to recover community property transferred by husband to defendants without wife's knowledge or consent, and to recover proceeds of a life insurance policy. Judgment for plaintiff affirmed.

Vernon F. Gant and Carlos J. Badger for Appellants.

Cleary & Zeff for Respondent.

OPINION

ADAMS, P. J.:

Plaintiff, respondent before this court, brought this action against Louise and Leandous Wissner, the parents of plaintiff's deceased husband, Leonard O. Wissner. The

complaint alleged that plaintiff and said decedent were married in California in 1930; that at the time of said marriage decedent had no property and that all property which he thereafter acquired was community property acquired by the joint efforts of the spouses; that Leonard died testate on November 14, 1945, leaving plaintiff as his surviving widow; that during the marriage the husband Leonard made transfers of community property to defendants, consisting of moneys, stocks, bonds and an automobile, without plaintiff's knowledge or consent and without consideration, and as a result plaintiff was defrauded of her community interest in such transferred assets; and that defendants refused to account to plaintiff for such assets and claimed to be the owners thereof, though they were without right, title or interest therein or thereto.

In a second count plaintiff alleged that decedent had served in the Army for several years prior to his death, and had taken out a national service life insurance policy in the sum of $10,000; that he had paid the premiums [fol. 25] thereon from his salary, which was community property, but had, without plaintiff's knowledge or consent, made his mother principal beneficiary and his father contingent beneficiary thereof; and that since the death of plaintiff's said huband defendants had received from the proceeds of said policy $882.05, but refused on demand to pay to plaintiff any portion thereof.

A third cause of action was stated, but it is not involved in this appeal.

As an answer to plaintiff's first cause of action defendants set up that moneys which decedent had paid over to them had been paid to them to satify a debt of decedent to them for aid and assistance which they had given him during his attendance at medical school. As for the second cause of action, they conceded that premiums on the life insurance policy had been paid with community funds, but alleged that the proceeds of such policy were payable to them alone by virtue of the federal statutes governing the issuance of such policies, and that such statutes alone controlled, and prohibited plaintiff from claiming any interest therein.

After trial of the issues findings were made in favor of plaintiff on the first and second causes of action; and from the judgment which followed defendants have appealed,

raising two issues, the first, whether the evidence supports the finding that the transfers to defendants were without consideration; and, second, whether the community property law of California gives plaintiff a right to any part of the proceeds of the life insurance policy.

[1] We are satisfied that there is sufficient evidence to support the conclusion of the trial court on the first count. Defendants admitted that during his service in the Army, decedent, who was first a captain and then a major, had paid to them approximately $3,000 in cash, and that he transferred to them an automobile which had been purchased in 1938. The moneys turned over were deposited in a joint bank account in the names of defendants and decedent, upon which both decedent and defendant Louise Wissner drew checks. After Leonard's death the defendants withdrew the balance remaining in the account. The automobile pink slip was received by defendants from their son in the fall of 1943, and they sold the automobile after his death for $1,080.

In a letter written by Leonard from India on October 22, 1944, beginning "Dear Folks All," which letter was delivered to the Bank of America, Modesto, by defendants, he stated that he had already sent a check for $30 and was enclosing another for $90.91. He then added: "I want a [fol. 26] bank account, probably commercial, to be held jointly by you folks and by me. I want the allotments to be deposited in it. I want a reserve of $250 to $500 to be allowed to accumulate and the bonds to be purchased as I previously instructed them, and turned over to you for safekeeping. I want a routine accounting sent to you and referred to me as you think best or necessary. I would like to have a check book sent me in case of need. Please make this all very clear to the bank. Present this letter if necessary." The evidence shows that the joint account between the defendants and their son was opened November 10, 1944, with an initial deposit of $337.50. Thereafter 12 deposits of like amounts were made through allotments by decedent directly to the bank, and there were others. Decedent from time to time drew upon the account and once his mother drew $500 and sent it to him. After Leonard's death she withdrew the balance and deposited it in defendants' own account with the American Trust Company. The Bank of America account was then closed.

Mrs. Wissner testified that $2,906.27 and the money for the automobile was all defendants received. She stated that prior to the time this account was opened the bank had been buying bonds for decedent out of funds sent it by Leonard, which bonds were in the names of decedent and one Naomi Beiler; that the bank had mailed the bonds to defendants who had put them in a safe deposit box, and, after Leonard's death, had turned them over to the attorney for his estate.

Plaintiff testified that she and Leonard were married in 1930, before the latter had completed his medical training. She was a nurse, and continued to practice her profession, her earnings being put into a joint account with her husband, which account continued until November, 1944, at which time Leonard withdrew all of the balance. Regarding the automobile turned over to defendants, she stated that she finished payments thereon after her husband went into the service. For six months after he went into the service plaintiff received an allotment of $90 per month, then it was discontinued.

Lloyd Wissner, brother of Leonard, testified regarding letters which he received from Leonard. One, dated September 26, 1943, requested Lloyd to get the doctor's instruments and equipment moved "before M. receives the notice that I have stopped her allotment." In another dated January 7, 1943, he stated that he wished his attorney could get an insurance policy away from plaintiff. In one dated September 14, 1943, Leonard mentioned "Naomi," [fol. 27] and stated that he wished he could find some way of forcing plaintiff to a settlement and a divorce. Another dated August 24, 1943, referred to efforts to get the pink slip for the automobile away from plaintiff and referred to exerting pressure upon her. In another dated August 14, 1943, he stated he stopped the allotment to Margaret to force her to come to terms. Also he stated that he was enclosing the pink slip to the automobile, saying "Possibly it would be best to have it transferred to you and then no one could touch it." On June 19, 1945, he referred to the automobile, stating Lloyd could continue to use it, "at any rate for the time being"; and in another dated July 21, 1945, decedent again expressed his wishes regarding the car.

Mrs. Louise Wissner testified regarding money sent to Leonard while he was in medical school in 1927 and 1929, but she was unable to state the amount thereof. She also introduced letters from Leonard sent while still in training, expressing thanks for money received, and making vague statements such as "Maybe some day we can make things right." At the time the bank account was directed to be opened in 1944 it was directed that the parents continue the purchase of bonds; but that was not done.

The testimony of defendant Leandous Wissner was indefinite and vague, both as to money sent to Leonard while at school, the amount thereof, and any promises to repay; and there is no evidence that any statement was ever sent him, or any payments made by him on account of same.

From the evidence in the case and the inferences deducible therefrom, the trial court's findings in favor of plaintiff are fully justified. Evidence and presumptions *contra* merely created a conflict which that court was authorized to resolve; and with its conclusions this court may not interfere. Furthermore, we think it is apparent that the transfers made to defendants were not made with an intent to repay them for moneys expended for his medical education, but were made in order to prevent his wife from receiving them, and to force her into a divorce and settlement to further plans which decedent was making for his future from which she was to be excluded.

[2] Regarding the right of plaintiff to recover from defendants a portion of the proceeds of the life insurance policy, it is not denied that premiums paid by decedent were paid from community funds; and that plaintiff had a vested interest in one-half of such community property cannot be gainsaid. (Civ. Code, § 161a.) In *Mazman* v. [fol. 28] *Brown*, 12 Cal. App. 2d 272, 273 [55 P. 2d 539], it was held that where insurance on a husband's life was bought and paid for with community funds, the husband could give away no more than one-half of the proceeds without the written consent of the wife. Numerous authorities so holding were there cited. Also see *Grimm* v. *Grimm*, 26 Cal. 2d 173, 175 [157 P. 2d 841]. From those decisions it is obvious that had the policy been issued by a private insurance company, no question of plaintiff's right to one-half of the proceeds could arise.

Appellants contend, however, that rights to the proceeds of a national service life insurance policy must be determined solely by federal statutes. They cite section 802(g) of title 38 U. S. C. A. [54 Stats. 1009] which provides, regarding such policies:

"The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided."

They particularly rely upon section 454a of the World War Veterans' Relief Act, title 38 U. S. C. A. [49 Stats. 609], which provides in part:

"Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, *shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.*" (Italics added.) And they assert that Congress by the foregoing enactment not only intended to control the proceeds of such policies after they were paid to them, but that its power to do so is found in the provisions of the United States Constitution, article I, granting to Congress the power to "provide for the common defense and general welfare of the United States," to "raise and support armies," to "provide and maintain a Navy," to make rules and regulations for the government and regulation of the land and naval forces, and to make all laws which shall be necessary and proper for carrying into [fol. 29] execution the foregoing powers. They also rely upon article VI, paragraph 2, of that Constitution providing that such Constitution and the laws of the United States which shall be made in pursuance thereof, shall

be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution and laws of any state to the contrary notwithstanding.

However, the foregoing declarations are all subject to the limitations imposed by the Tenth Amendment, to wit, that the powers of the federal government are only such as are delegated, and all other powers, except such as are specifically denied to the states, repose in the states and not in the federal government; and the Fifth Amendment, providing that the Congress shall not deprive any person of life, liberty or property without due process of law, nor take his property for public use without just compensation.

The question before us, then, is did Congress intend, by section 454a, *supra*, to provide that the proceeds of a national service insurance policy, after payment of same to a named beneficiary, are not subject to the laws of a state governing title to property within that state, and, if it did so intend, had it the power under the Constitution to so provide, and thus divest a wife in California of property rights which under the laws of this state are community property in which such wife has a vested interest.

It cannot be denied that since the enactment of section 161a of the California Civil Code in 1927, a wife in this state has a vested interest in one-half of the earnings of the spouses since that date. Such rights have been recognized by both federal and state courts. See *Lang* v. *Commissioner of Internal Revenue*, 304 U. S. 264 [58 S. Ct. 880, 82 L. Ed. 1331, 1336, 118 A. L. R. 319]; *United States* v. Malcolm, 282 U. S. 792 [51 S. Ct. 184, 75 L. Ed. 714]; *Commissioner of Internal Revenue* v. *Harmon*, 323 U. S. 44 [65 S. Ct. 103, 89 L. Ed. 60, 63, 67]; *Poe* v. *Seaborn*, 282 U. S. 101 [51 S. Ct. 58, 75 L. Ed. 239, 243]; *United States* v. *Pettigrew*, 81 F. 2d 666.

In *Mundt* v. *Connecticut Gen. Life Ins. Co.*, 35 Cal. App. 2d 416, 421 [95 P. 2d 966], decedent's mother was designated as the beneficiary of a life insurance policy paid for with community earnings. A judgment awarding one-half the proceeds to the widow was affirmed, the court saying:

"From the leading case of *New York Life Ins. Co.* v. *Bank of Italy*, 60 Cal. App. 602 [214 P. 61], through the many intervening cases, down to *Travelers Ins. Co.* v.

[fol. 30] *Fancher*, 219 Cal. 351 [26 P. 2d 482], the only test applied to this problem has been whether the premiums (on a policy issued on the life of a husband after coverture) are paid entirely from community funds. If so, the policy becomes a community asset and the nonconsenting wife may recover an undivided one-half thereof 'without regard' [as said in *Dargie* v. *Petterson*, 176 Cal. 714, 721, 169 P. 360] 'to the amount or condition of the estate remaining in his [the husband's] hands at the time of his death', and we might add, without regard to the disproportionate size of the premium when compared with the face of the policy."

In *Bazzell* v. *Endriss*, 41 Cal. App. 2d 463 [107 P. 2d 49], the trial court found that the naming of the mother of an insured husband as beneficiary of his life insurance constituted a voluntary gift without valuable consideration, and was supported by evidence which showed that the premiums were paid from the husband's earnings during coverture and that at no time did his wife consent to a gift of her community interest in the policy. (See Civ. Code, §§ 161a, 172.)

In *Grimm* v. *Grimm*, 26 Cal. 2d 173 [157 P. 2d 841], the court said that where premiums on an insurance policy issued on the husband's life are paid with community funds, the policy is community property; and that "It is settled that even though the insurance contract may provide that the insured husband has the right to change the beneficiary without the wife's consent where she is named as such, any change of beneficiary without her consent and without a valuable consideration is voidable, and after the death of the husband the wife may maintain an action for her community share in the proceeds of the policy. (*Mazman* v. *Brown*, 12 Cal. App. 2d 272, 275 [55 P. 2d 539]; *Travelers Ins. Co.* v. *Fancher*, *supra* [219 Cal. 351], at p. 356; *Dixon Lumber Co.* v. *Peacock*, 217 Cal. 415, 418 [19 P. 2d 233]; *Blethen* v. *Pacific Mut. L. Ins. Co.*, *supra* [198 Cal. 91], at p. 101 [243 P. 431]; see 3 Cal. Jur. 10-Yr. Supp. 622; 114 A. L. R. 545, 554.)"

The principles set forth in the foregoing cases are reiterated in *Pacific Mutual Life Ins. Co.* v. *Cleverdon*, 16 Cal. 2d 788, 792 [108 P. 2d 405], though the decision in that case was different because it was found that the earnings out of which the premiums were paid were not

community property, and that they were applied to the premiums with the knowledge and consent of the surviving spouse of the insured.

Also see *In re Towey's Estate*, 22 Wn. 2d 212 [155 P. 2d 273, 275]; *In re Miller's Estate*, 44 N. M. 214 [100 P. 2d 908, 910]; *Blackmon* v. *Hansen*, 140 Tex. 536 [169 S. W. 2d 962, 965].

[fol. 31] In *Cooke* v. *Cooke*, 65 Cal. App. 2d 260, 266, 269, 272 [150 P. 2d 514] (hearing in Supreme Court denied) it was held that where premiums on an insurance policy were paid by the husband out of community funds (the earnings of the husband) the wife had a vested interest in the portion of the insurance purchased by such community funds, and was entitled to at least a proportionate amount of the proceeds of the policy paid for with community funds; and that to deprive her of it by a legislative act would be to deprive her of a vested property right of which she could not be divested without due process of law; that to do so would violate the Fourteenth Amendment to the federal Constitution, and section 13 of article I of the California Constitution.

Reasoning from the foregoing cases, the conclusion seems to follow that, in view of the Fifth Amendment, the federal government had no power to provide, as it is contended it did in section 454a, *supra*, that payments made to a beneficiary of a national service life insurance policy shall be exempt from the claims of the widow of the deceased insured to the right vested in her under the laws of this state to one-half of such payments *after* their receipt by the beneficiary. As hereinbefore stated, appellants rely upon article VI, paragraph 2, and article I, section 8, of the United States Constitution. But no cognizance is taken of the Fifth Amendment, which limits the power of the federal government as the Fourteenth Amendment limits those of the states, and prohibits the taking of private property without due process of law. It therefore seems to follow that if, as decided in *Cooke* v. *Cooke, supra*, a surviving wife of a decedent who had paid for an insurance policy out of community funds could not be deprived of her vested interest in the proceeds of such policy without violating the provisions of the Fourteenth Amendment, the federal government could not deprive a wife of the deceased veteran of her vested right to one-half of the proceeds of a national

service life insurance policy paid for out of community funds, at least after such funds had come into the possession of a named beneficiary other than the wife, without violating the Fifth Amendment.

In the case before us the judgment was entered against the beneficiaries for one-half of the payments on the policy which they had already received, and they were ordered to pay to plaintiff one-half of proceeds received by them. Such judgment is fully in accord with the judgments in the Cooke case and other cases above cited, and cannot be said to infringe upon any rights or powers of the United States [fol. 32] under the provisions of the United States Constitution relied upon by appellants.

As said in 6 Ruling Case Law, section 436, page 440:

"The requirement of due process of law was introduced into the constitution of the United States by the fifth amendment as a limitation upon the powers of the national government, and by the fourteenth amendment as a guaranty against any encroachment upon ~~an acknowledged~~ right of citizenship by the legislatures of the states."

As to the limits of the powers of Congress, in 1 Cooley's Constitutional Limitations, eighth edition, 11, the author says:

"The government of the United States is one of *enumerated powers;* the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess."

It is said in 11 American Jurisprudence, section 334, page 1143, that: "The Fifth Amendment to the Federal Constitution prevents the Federal Government or its agencies from depriving any person of his property without due process of law. The Fourteenth Amendment to the Federal Constitution, and all the various state Constitutions, prevent any action by a state which would accomplish such deprivation." And in 12 American Jurisprudence, section 569, page 262, we find that: "The effect of the guaranty [of the Fifth and Fourteenth Amendments] is to inhibit the taking of one person's property and giving it to another, contrary to settled usages and modes of procedure, without notice and opportunity for a hearing. *An attempt by statute to*

work such a change of ownership would be a glaring violation of this guaranty and could not be defended as an exercise of the police power. (Italics added.)

"The protection extends to rights, in the broadest sense of the term. In the determination of whether the requirement has been observed, regard must be had to substance rather than to form, for the mere form of the proceeding cannot convert the process used into due process of law, if the necessary result is illegally to deprive a person of his property without compensation." See *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139 [33 S. Ct. 1033, 57 L. Ed. 1427]; *Curry* v. *McCanless*, 307 U. S. 357 [59 S. Ct. 900, 83 L. Ed. 1339, 123 A. L. R. 162]. Also see 16 Corpus Juris Secundum, section 602, page 1205, stating that "a denial of due process of law results from any statute, whether state or federal, which takes away any of the essential attributes of private [fol. 33] property, . . ." (citing *Ferris* v. *Wilbur*, 27 F. 2d 262) and 12 C. J., §§486, 487, pp. 956, 957.

In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 [41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045], it was said that a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth Amendment (with citations). Also see *Hamilton* v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146, 155 [40 S. Ct. 106, 64 L. Ed. 194, 199]. The same rule is stated in *Darlington* v. *Board of Councilmen*, 282 Ky. 778 [140 S. W. 2d 392, 396] (citing the Cohen case, *supra*), and in *Henderson* v. *Bryan*, 46 F. Supp. 682, 684, and *Schatte* v. *International Alliance, etc.*, 70 F. Supp. 1008, 1010 (decided by the same court that decided the Barton case, *infra*).

Appellants cite numerous cases which, they contend, sustain their position; but, with one exception, none of them involved divestiture of vested rights in community property. Assuming, but not deciding, the correctness of such decisions, they do not determine the issues in this case, nor is it necessary herein to determine to what extent the Congress could, under its limited powers, exercise control over the proceeds of national service life insurance policies prior to their receipt by the beneficiaries. The exception above mentioned is *Barton* v. *United States*, 75 F. Supp. 703, in which a widow of a deceased veteran applied to the Administrator of Veterans' Affairs to pay to her a one-half interest in the portion of the proceeds of an insurance policy which had resulted from the payment of premiums out of

community funds of the spouses. The claim was disallowed and payments were made to the named beneficiary, decedent's mother. It may be conceded without affecting the conclusion in the case before us, that the Administrator properly so acted pursuant to the terms of the policy, which was a contract between the United States and the insured, and that the trial court properly concurred in his decision. The Barton decision is not, of course, conclusive upon this court; and we think it is clearly distinguishable insofar as the necessities of that case were determined. But if, as some of the language of the opinion indicates, that court decided that because of the provisions of section 454a, *supra*, the Congress intended to and did attempt to provide that where premiums on a national service life insurance policy are paid for out of the community property, in which, under the laws of California, a wife has a vested interest, it must follow that the widow of decedent may be divested of her community property right by the action of the husband in [fol. 34] using such funds for payment of premiums on such insurance without her knowledge or consent, and by naming another than the wife as beneficiary deprive the surviving widow of her vested rights and render it impossible for her to enforce her rights against the beneficiaries after their receipt of the proceeds of the policy, then we must respectfully disagree with the Barton case.

Also see *Bostrom* v. *Bostrom*, 60 N. D. 792 [236 N. W. 732]; *Lewis* v. *Lewis*, 34 Cal. App. 2d 422 [93 P. 2d 850]; *Baker* v. *Tulsa Building & Loan Assn.*, 179 Okla. 432 [66 P. 2d 45]; *Miller* v. *McKenna*, 23 Cal. 2d 774, 783 [147 P. 2d 531].

[3] The one remaining point on this appeal is whether the trial court erred in allowing the plaintiff one-half the value of the automobile at the time it was transferred to appellants, or whether plaintiff was entitled to one-half of the $1,080 received from sale of same after the death of Leonard Wissner. The trial court found that the value of the car at the time it was transferred to defendants was $1,600, and awarded plaintiff judgment for one-half of the value thereof. That the said automobile was community property cannot be questioned, since it was paid for with the community earnings of the spouses after their marriage in 1930, including the earnings of plaintiff who made the final payments out of her own earnings after her husband entered the service. She testified that she did not know of

the transfer until after the death of her husband, after which she made demand therefor. The trial court found that the transfer was without consideration, and the evidence sustains that finding. It might be questioned, in view of the evidence, whether the decedent ever intended to transfer the ownership of the automobile to his parents at all. However, they assert ownership, and it may be presumed that such ownership was acquired when the car and pink slip were delivered to them, as there is nothing to show a later acquisition of title. The trial court, then, may well have concluded that it was transferred to them at that time, and when its value was $1,600. So determining, its finding that plaintiff is entitled to one-half of its value at that time is supported by the record. Defendants knew that it was the community property of plaintiff and their son, and they may be said to have converted it to their own use at the time of the transfer. Section 3336 of the Civil Code thus became applicable as to the amount of recovery from the convertor, to wit, the value of the property at the time of conversion. And if defendants, having notice of plaintiff's rights, as they had, chose to sell the vehicle, they must respond to [fol. 35] the owner for its value, regardless of the price at which they chose to sell it. (*A. Meister & Sons Co. v. Harrison*, 56 Cal. App. 679, 681 [206 P. 106]).

The judgment is affirmed.

Peek, J., and Thompson, J., concurred.

[fol. 36] In the District Court of Appeal of the State of California in and for the Third Appellate District

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Wissner v. Wissner

Order Denying Petition for Rehearing—February 11, 1949

By the Court:

Appellants' petition for rehearing is denied.

(No opinion filed.)

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 37] IN THE SUPREME COURT OF CALIFORNIA

In Bank

WISSNER

v.

WISSNER *et al.*

ORDER DENYING HEARING AFTER JUDGMENT BY DISTRICT COURT OF APPEAL—Filed March 21, 1949

Appellants' petition for hearing Denied.
Schauer, J., voting for a hearing.

Gibson, Chief Justice.

Dated March 21, 1949.

[File endorsement omitted.]

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 38] SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed May 16, 1949

PETITION FOR APPEAL

To the Honorable Annette Adams, Presiding Justice of the District Court of Appeal of the State of California, Third Appellate District:

Considering themselves aggrieved by the final decision of the District Court of Appeal of the State of California, Third Appellate District, in the above entitled cause, appellants therein, Louise M. Wissner and Leandous H. Wissner, hereby pray that an appeal be allowed to the Supreme Court of the United States, herein, and for an order fixing the amount of the bond thereon.

ASSIGNMENT OF ERRORS

And the said appellants, Louise M. Wissner and Leandous H. Wissner, assign the following errors in the record and proceedings in the said cause;

1. The District Court of Appeal of the State of California, [fol. 39] Third Appellate District, erred in affirming a judgment of the Superior Court of the State of California in and for the County of Stanislaus which awarded one-half the proceeds, paid and to be paid, of a National Service Life Insurance policy to appellee, a soldier's widow, under the community property law of the state when the soldier had designated appellants, his parents, the beneficiaries of the policy and the federal statutes provide:

> "Payments made to, or on account of, a beneficiary under any of the laws relating to veterans * * * shall not be liable to attachment, levy, or seizure by or under any legal or equitable process, whatever, either before or after receipt by the beneficiary."

and thereby deprived appellants of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The District Court of Appeal of the State of California, Third Appellate District, erred in applying the provisions of the California community property law and in awarding one-half the proceeds of a National Service Life Insurance policy, paid and to be paid, to appellee and thereby deprived appellants of their property contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it failed to apply the provisions of an act of the Congress and awarded appellee judgment for one-half the proceeds of a National Service Life Insurance policy.

4. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of

[fol. 40] their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it refused to apply the provisions of an act of the Congress and held that the provisions of the act were invalid under the Fifth Amendment to the Constitution of the United States.

5. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it held that the provisions of an act of the Congress were invalid under the Tenth Amendment to the Constitution of the United States and refused to apply them on appellants' behalf.

6. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it ignored the provisions of Article VI, paragraph 2 of the Constitution of the United States and awarded appellee one-half the proceeds of a National Service Life Insurance policy, paid and to be paid, by applying California laws relating to community property and ignoring the provisions of the federal statutes in conflict therewith.

7. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it refused to apply the provisions of an act of the Congress in appellants behalf and held that the provisions of the act were void under the Fifth and Tenth Amendments to the Constitution of the United States.

[fol. 41] PRAYER FOR REVERSAL

For which errors the appellants, Louise M. Wissner and Leandous H. Wisner, pray that the judgment of the District Court of Appeal of the State of California, Third Appellate District, in the above entitled cause, in so far as it effects the rights of the appellants to retain the proceeds of a National Service Life Insurance policy, be reversed and a judg-

ment rendered in favor of the said appellants on said issues and for costs.

Dated: May 16, 1949.

Vernon F. Gant, W. Coburn Cook, Carlos J. Badger, Counsel for Appellants.

[File endorsement omitted.]

[fol. 42] Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—Filed May 16, 1949

The appellants in the above entitled cause having prayed for the allowance of an appeal to the Supreme Court of the United States from that portion of the judgment rendered in said cause by the District Court of Appeal of the State of California, Third Appellate District, which affects the rights of the appellants to retain the proceeds of a National Service Life Insurance policy, paid and to be paid, and having presented and filed the petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the District Court of Appeal of the State of California, Third Appellate District, in the above entitled cause as provided by law; and

It is further ordered that the Clerk of the District Court of Appeal of the State of California, Third Appellate District, shall prepare and certify a transcript of the record, [fol. 43] proceedings and judgment in said cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within sixty days of this date;

And it is further ordered that security for costs on appeal be fixed in the sum of Two Hundred Fifty and no/100 ($250.00) Dollars.

Dated: May 16, 1949.

Adams, Presiding Justice of the District Court of Appeal of the State of California, Third Appellate District.

[fols. 44-48] Bond on appeal for $250.00 approved and filed May 16, 1949, omitted in printing.

[fol. 49] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed May 23, 1949

To the Clerk of the District Court of Appeal of the State of California, Third Appellate District:

You are hereby requested to prepare a transcript of the record in this case and transmit it to the Supreme Court of the United States at Washington, D. C. duly certified and authenticated and within the time prescribed by the rules of the Supreme Court of the United States, consisting of the following documents and portions of the record in this cause, which constitute the record on appeal to the Supreme Court of the United States:

1. The following portions of the Clerk's Transcript.
   a. Amended Complaint (C.T. 1-10)
   b. Answer to Amended Complaint (C.T. 16-21)
   c. Findings, Conclusion and Judgment (C.T. 27-38)
   d. Notice of Appeal (C.T. 40)

2. Opinion and Judgment of the District Court of Appeal of the State of California, Third Appellate District.

3. Order Denying Rehearing in the District Court of Ap-
[fol. 50] peal of the State of California, Third Appellate District.

4. Order Denying Hearing in the Supreme Court of the State of California.

5. Petition for Appeal, Assignment of Errors and Prayer for Reversal.

6. Order Allowing Appeal.

7. Bond for Costs.

8. Citation.

9. Statement as to Jurisdiction.

10. Statement Directing Attention to Paragraph 3 of Rule 12.

11. This Praecipe.

Dated at Modesto, California, this 19th day of May, 1949.

Vernon F. Gant, Carlos J. Badger, W. Coburn Cook, Counsel for Appellants.

Received copy of the within Praecipe this 19th day of May, 1949.

Cleary & Zeff, by Leslie A. Cleary, Counsel for Appellee.

[File endorsement omitted.]

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 52-53] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS INTENDED TO BE RELIED ON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—filed June 14, 1949

Appellants adopt their assignment of errors as a statement of the points to be relied on in this Court and represent that all of the record designated in appellants' praecipe to the Clerk of the District Court of Appeal of the State of California, Third Appellate District is necessary for the consideration of the case and that only that part of the record so designated is necessary for the consideration of the case.

W. Coburn Cook, Vernon F. Gant, Carlos J. Badger, Counsel for Appellants.

Received copy of the foregoing Statement of Points and Designation of Part of the Record to be Printed this 9th day of June, 1949.

Cleary & Zeff, by Leslie A. Cleary, Counsel for Appellee.

[fol. 54] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER, et al., Appellants,

vs.

MARGARET WISSNER

ORDER NOTING PROBABLE JURISDICTION—October 10, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on Cover: Enter W. Colburn Cook. File No. 53,866 California, District Court of Appeal, Third Appellate District, Term No. 119. Louise M. Wissner and Leandous H. Wissner, Appellants, vs. Margaret Wissner. Filed June 14, 1949. Term No. 119 O. T. 1949.